NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

READYLINK HEALTHCARE, a Nevada corporation; et al.,

Plaintiffs - Appellants,

v.

DAVID JUSTIN LYNCH, an individual; et al.,

Defendants - Appellees.

No. 04-55890

D.C. No. CV-04-01265-NM

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Nora M. Manella, District Judge, Presiding

Argued and Submitted February 17, 2006
Pasadena, California

Before: B. FLETCHER, TASHIMA, and CALLAHAN, Circuit Judges.

Plaintiffs-Appellants Readylink Healthcare and Barry Treash appeal from the district court's grant of Defendants-Appellees David Lynch and Lynch & Associates' motion to dismiss pursuant to Federal Rule of Civil Procedure

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12(b)(6). We review *de novo* the district court's grant of Appellees' motion to dismiss, *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004), and the district court's decision to dismiss without leave to amend for an abuse of discretion. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc). We initially affirmed the district court's dismissal as to all but one claim. We now dismiss that claim. We do not restate the facts here as they are known to the parties.

The district court dismissed Appellants' false advertising and unfair competition (both federal and state), false light, and trade libel claims, holding that Appellees' statements were not misleading as a matter of law. It also dismissed their invasion of privacy claim.[1] Appellants' federal and state false advertising and

[1] We certified Appellants' invasion of privacy claim to the California Supreme Court for guidance as to whether that court's decision in *Gates v. Discovery Communications, Inc.*, 101 P.3d 552 (Cal. 2004), bars invasion of privacy claims for the publication of accurate facts drawn from the public record where the publisher is not a media organization or a member of the press. The California Supreme Court has denied our request for certification. *Readylink Healthcare v. Lynch*, No. S141869 (Cal. May, 17, 2006).

unfair competition claims[2] turn on whether a reasonable person would have been deceived or misled by the statements. *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242 (9th Cir. 1990). This is a legal determination appropriately made by the district court. *Freeman v. The Time, Inc., Magazine Co.*, 68 F.3d 285, 288 (9th Cir. 1995). We agree with the district court that a reasonable person would not be misled by the statements published on Lynch's website. *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1182 n.8 (9th Cir. 2003).

False light is essentially a libel claim under California law. *Aisenson v. Am. Broad. Co.*, 220 Cal. App. 3d 146, 161 (1990). The district court was correct to hold that the postings on Appellees' website were not false and did not create a false impression about Appellants. *Solano v. Playgirl, Inc.*, 292 F.3d 1978, 1082 (9th Cir. 2002). Appellants' trade libel claim requires a finding that Appellees' statements could reasonably be understood to be disparaging in that they were "untrue or misleading and [were] made to influence potential purchasers." *Atlantic Mut. Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1035 (2002). The district court was correct to find that Appellees' statements that others should read the

[2] The federal claims were brought pursuant to the Lanham Act, 15 U.S.C. § 1125(a) (2006). The state unfair competition and false advertising claims were brought under Cal. Bus. & Prof. Code § 17200 (West 2005) and Cal. Bus. & Prof. Code § 17500 (West 2005), respectively.

public documents posted to the website cannot support this claim. We therefore affirm the district court's dismissal of Appellants' false advertising and unfair competition (federal and state), false light, and trade libel claims.

The district court dismissed Appellants' intentional infliction of emotional distress claim because the conduct alleged was not "outrageous." Conduct is "outrageous" for the purposes of a claim for intentional infliction of emotional distress where it is "so extreme as to exceed all bounds of that usually tolerated in a civilized community." *KOVR-TV, Inc. v. Superior Court*, 31 Cal. App. 4th 1023, 1028 (1995). We agree with the district court that the publication of true and public-record information is not outrageous conduct within the meaning of cases interpreting the tort of intentional infliction of emotional distress.

The district court also dismissed Appellants' claims for intentional and negligent interference with potential business advantage. Lynch does not owe Appellants a duty of care, barring their negligent interference claim. *Stolz v. Wong Comm'cn Ltd. P'ship*, 25 Cal. App. 4th 1811, 1825 (1994). In addition, Appellants did not plead that Appellees "engaged in conduct that was wrongful by some legal measure other than the fact of the interference itself." *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 393 (1995). Thus, the claim for intentional interference was also correctly dismissed.

The district court also dismissed Appellants' claim for invasion of privacy. Appellants relied on *Briscoe v. Reader's Digest Association, Inc.*, 483 F.2d 34 (Cal. 1971), to establish their claim, arguing that the Supreme Court's decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), did not undermine *Briscoe*. The California Supreme Court's recent decision in *Gates v. Discovery Communications, Inc.*, 101 P.3d 552 (Cal. 2004), which relied upon *Cox Comminications* to overrule *Briscoe*, undermines Appellants' invasion of privacy claim.[3]

Appellants also attempt to support their invasion of privacy claim by arguing that Lynch's website is commercial speech and is therefore entitled to less protection under the First Amendment. Although attorney advertising is clearly commercial speech, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995), it can take many forms, several of which are protected. *E.g., In re. R.M.G.*, 455 U.S. 191 (1982) (dealing with mailed announcements); *Bates v. State Bar*, 433 U.S. 350 (1977) (concerning newspaper advertising). While we find Lynch's website tasteless, it is analogous to an attorney mass-mailing, an offer to the general

[3] Because both *Cox Broadcasting* and *Gates* were cases dealing with media liability, in our certification request, we asked the California Supreme Court to determine whether its ruling in *Gates* extended to disclosures by non-media persons. We now conclude that California courts would extend *Gates*' holding to such persons.

population in that it is not directly delivered to potential clients. Mass mailings to the general population are protected commercial speech. *Shapero v. Ky. Bar Assn.*, 486 U.S. 466, 472 (1988) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 638 (1985)). Lynch's website is clearly distinguishable from targeted face-to-face solicitation of potential clients, which may be regulated. *Florida Bar*, 515 U.S. at 618. Because Appellants cannot rely either on *Briscoe* or on the commercial speech doctrine, Lynch's website cannot be the basis of an invasion of privacy claim, and we affirm the district court's dismissal of that claim.

Finally, we affirm the district court's dismissal without leave to amend. It cannot be said that the district court abused its discretion as each of Appellants' many claims spells out the essential facts, none of which are in dispute. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

We AFFIRM the district court's grant of Appellees' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

AFFIRMED.